Office - Supreme Court, U.S.
FILED
OCT 24 1992
ALEXANDER L. STEVAS,
CLERK

No. 92-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SHIRLEY STOVER, *et al.*,
Petitioners

v.

MELANIE HANSON JOHNSON,
GERARD STANLEY JOHNSON, *et al.*, and
JACQUELINE N. RAU,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

Bruce Youngers *
Paul Martin Wolff *
Margot P. Pierce
Williams & Connolly
The HR Building
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioners the Episcopalian Publishing and the Church

* Counsel of Record

[Additional List of Counsel Continued on Inside Cover]

Capitol Hill Printing Co., Inc. • 543-0400 • Washington, D.C. 20002

ROBERT C. GORDON
4722 Broadway
Kansas City, Missouri 64112

ARTHUR H. STOUP
STOUP & THOMPSON
950 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106

ROBERT L. COLLINS
2800 Louisiana Street
Houston, Texas 77006

WILLIAM P. WHITAKER
4722 Broadway
Kansas City, Missouri 64112

RICHARD L. COLBERT
NORTH COLBERT AND FIELDS
211 Professional Building
1103 Grand Avenue
Kansas City, Missouri 64106

with respect to all matters pertaining to class certification,

ARTHUR R. MILLER
Harvard Law School
Cambridge, Massachusetts
02138

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	3
I. Respondents Misstate the Holding of the Eighth Circuit. That Court Held that the District Court's Certification of a Mandatory Class Constituted an Injunction Appealable as of Right under 28 U.S.C. Section 1292	3
II. Respondents Attempt to Minimize the Impact the Eighth Circuit's Ruling Will Have on the Administration of Fed. R. Civ. P. 23	5
III. Respondents Misunderstand the "In Aid of" Exception to the Anti-Injunction Act	6
IV. Although the Eighth Circuit did not Disturb the District Court's Findings that Certification was Proper, Respondents Wish to Relitigate It Here	6
V. Respondents Say this Case is Moot	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 1

Deposit Guaranty National Bank v. *Roper*, 445 U.S. 326 (1980) 7

Gardner v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) 1, 5

In re Glenn W. Turner Enterprises Litigation, 521 F.2d 775 (3d Cir. 1975) 6

Mullaney v. *Anderson*, 342 U.S. 415 (1952) 7

Rogers v. *Paul*, 382 U.S. 198 (1965) 7

United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 7

United States Parole Commission v. *Geraghty*, 445 U.S. 388 (1980) 7

Statutes:

28 U.S.C. § 1292(a)(1) 1, 3

28 U.S.C. § 2283 2

Rules:

Federal Rule of Civil Procedure 23 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-217

SHIRLEY STOVER, *et al.*,
Petitioners

v.

MELANIE HANSON JOHNSON,
GERARD STANLEY JOHNSON, *et al.*, and
JACQUELINE N. RAU,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

Petitioners raise in their petition for certiorari two important questions of federal law decided by the Eighth Circuit, questions which should be answered by this Court. These questions are:

1. *Whether an order certifying a mandatory class under Fed. R. Civ. P. 23(b)(1) constitutes an injunction appealable as of right under 28 U.S.C. § 1292(a)(1).* As stated in the petition, the effect of the Eighth Circuit's ruling is to render not only all class certification orders immediately appealable, but to transform *any order* which may have a restrictive effect on a party's behavior into an injunction. Unless the Eighth Circuit is reversed, this Court's warnings against piecemeal review in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) and *Gardner*

v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) will go unheeded and the final judgment rule will be undermined.

2. *Whether the Anti-Injunction Act, 28 U.S.C. § 2283, eliminates a district court's power to certify a mandatory class action once any member of the class has instituted state court proceedings.* The Eighth Circuit's decision virtually eliminates mandatory class actions since even *one* member of a class, by a rush to the state courthouse, can strip a federal court of the power to certify a mandatory class, no matter how necessary or desirable it would be to join all class members in one proceeding. If mandatory classes are to be thus emasculated, it is this Court which should so decide.

In opposition, respondents Crown Center Redevelopment Corp. and Hallmark Cards, Inc.,[1] Jacqueline N. Rau, and Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.*, make several contentions, not one of which diminishes the importance of the questions petitioners have raised.

A. In an attempt to minimize the impact of the Eighth Circuit's ruling that the District Court's entire certification order constituted an injunction, respondents claim that the panel held only that one sentence in the District Court's order constituted the forbidden injunction. This is simply not so. The language of the majority opinion clearly indicates that the court found the *entire* certification order to be an injunction.

B. Respondents downplay the effects of the Eighth Circuit's ruling on Rule 23, denominating the case "fact-specific." To the contrary, the particular facts concerning this controversy are irrelevant to the force of the Eighth

---

[1] Although Crown Center Redevelopment Corp. and Hallmark Cards, Inc. have chosen to designate themselves as respondents, the Eighth Circuit denominated them as *amici curiae*. Pet. A.2a n.3.

Circuit's ruling on mandatory class actions. As a result of the panel's decision, virtually every mandatory class will be thwarted by the simple expedient of having one class member file suit in state court.

C. Respondents have revived all the arguments they presented with much vigor before the Eighth Circuit regarding the propriety of the District Court's certification order under Fed. R. Civ. P. 23. The Eighth Circuit, having reviewed the arguments, choose not to disturb the District Court's findings; indeed, it commended the court for its "carefully reasoned" order. There is thus no reason for this Court to consider arguments which the Eighth Circuit clearly felt had no merit.

D. Respondent Rau has urged that the settlement of Mrs. Stover's claim renders the case moot. Nothing is farther from the truth. The issues raised in this case are more sharply presented than ever, given the imminence of trials in both the state and federal courts. And there can be no question that Mrs. Stover not only wishes to, but has the standing to pursue her petition for certiorari.

ARGUMENT

I. Respondents Misstate the Holding of the Eighth Circuit. That Court Held that the District Court's Certification of a Mandatory Class Constituted an Injunction Appealable as of Right Under 28 U.S.C. Section 1292

The respondents attempt to minimize the importance of the Eighth Circuit's ruling by misstating its scope. They claim that the Eighth Circuit held only that the District Court's alleged prohibition against the settlement of punitive damage claims, not the certification order itself, constituted an injunction, appealable as of right. The language of the Eighth Circuit's opinion clearly indicates otherwise:

> the substantial effect of the [certification] order also enjoined the State plaintiffs from bringing their

> pending state court actions . . . . Appendix to Petition for Writ of Certiorari (hereinafter "Pet. A.") at 9a.

To call the District Court's certification of a mandatory class an injunction, as the Eighth Circuit did, does violence both to the facts of this case and to the final judgment rule enunciated by this Court. That is why the respondents distort the Eighth Circuit's opinion.

At no time did either the respondents or the state court interpret the District Court's order as an injunction. The respondents were not held back; they *chose* not to proceed with their state court actions. *See*, Respondent Johnson Appendix to Brief in Opposition (hereinafter, Res.J.A.) at 4a.

Indeed, counsel for respondent Johnson openly declared in state court on July 11, 1982 that the state proceedings had not been enjoined: "This Court has not been enjoined, these proceedings have not been stayed . . . ." [2]

The District Court never specifically enjoined the respondents. There was no order stopping settlement of punitive damage claims [3] and no order stopping the state court proceedings. The certification of a mandatory class thus did not enjoin the respondents. At most it dampened their zeal to go forward with the state court actions. To label this effect an injunction, as the Eighth Circuit did, is to stretch the meaning of injunction to its limits and to make appealable as of right any court order that restricts a party's behavior or decreases the desirability of a particular course of action.

---

[2] Transcript of proceedings before Hon. Timothy D. O'Leary, Circuit Court of Jackson County, Missouri, July 1, 1982.

[3] Indeed, in an order dated March 2, 1982, Judge Wright explicitly stated that the Court "strongly encourages the continued settlement of legitimate damage claims" and that "the decision to continue settlement negotiations with individual named members of the class rests wholly with the defendants."

This Court said just the opposite in *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). It warned that orders which have "a significant effect on the litigation . . . are not for that reason converted into injunctions." *Id.* at 481. But if the Eighth Circuit's opinion is left standing, litigants whose conduct has been restricted will cite the opinion and recast orders into injunctions, appealable as of right. The final judgment rule will be corroded by an all-encompassing definition of injunction—a definition totally at odds with this Court's statement that injunctions do not include "orders that have no direct or irreparable impact on the merits of the controversy." *Id.* at 482.

II. Respondents Attempt to Minimize the Impact the Eighth Circuit's Ruling Will Have on the Administration of Fed. R. Civ. P. 23

Respondents wish to paint this case as *sui generis* and argue that the Eighth Circuit's decision will thus affect very few cases. Wishing cannot make it so.

First, it is irrelevant for purposes of the impact of the Eighth Circuit's ruling that more state than federal cases were filed. If the Eighth Circuit's ruling survives, *one member* of a class has the power to prevent a mandatory class action by commencing his state court suit before the certification order issues.

It is equally irrelevant that this certification order issued in a mass disaster case. The Eighth Circuit's ruling would apply to *every* mandatory class action authorized by Rule 23, except in the rare instance where the federal court has been given exclusive federal jurisdiction.

The Eighth Circuit's opinion would indeed eviscerate virtually all mandatory class actions in the federal court, making them depend for their existence on whether or not a rush to the state courthouse preceded certification.

III. Respondents Misunderstand the "In Aid of" Exception to the Anti-Injunction Act

Respondents apparently misunderstand petitioner's argument that the certification of a mandatory class action to protect a limited fund "is necessary in aid of" the federal court's jurisdiction. It is petitioner's position that the certification of a mandatory federal class does *not* enjoin simultaneous state court actions. However, if one accepts the Eighth Circuit's view, then the certification order must be "in aid of" the federal court's jurisdiction. If not, the mandatory class under Fed. R. Civ. P. 23 is a dead letter.[4]

IV. Although the Eighth Circuit did not Disturb the District Court's Findings that Certification was Proper, Respondents Wish to Relitigate It Here

Respondents want to relitigate the findings of the District Court that certification in this case was appropriate, findings which the Eighth Circuit did not disturb although the issues were raised and fully briefed. Indeed, the panel commended Judge Wright on his "carefully reasoned" order. Since the certification order itself was clearly not one the Eighth Circuit felt needed correction, there is no need for this Court to consider it.[5]

---

[4] Contrary to respondents' view, there is no issue here as to whether a federal court would have the power to issue an express injunction prohibiting state court plaintiffs from proceeding *after* the certification order has been entered. It need only decide that the court be permitted to enter the order that Fed. R. Civ. P. 23 authorizes—an order certifying a mandatory class action. That is what distinguishes this case from *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975). That case involved an *express injunction* against state court proceedings in addition to the certification order.

[5] For a further discussion of these issues, see Respondent Stover's Brief In Opposition to the Conditional Cross-petitions of Crown Center Redevelopment Corporation and Hallmark Cards, Incorporated, Jacqueline N. Rau, and Melanie Hanson Johnson and Gerard Stanley Johnson, et al.

V. Respondents Say this Case is Moot

This is simply not so. Although the District Court has held a hearing on a settlement proposal for Mrs. Stover's case, it has not yet approved it. Even if the settlement is approved, there can be no question that Mrs. Stover has the right to proceed with her petition and she has reaffirmed her willingness to do so both at the hearing held by the District Court and in a subsequent pleading. As this Court explained in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), a settling class representative has an interest in the litigation beyond his or her individual claim. Here, as in *Roper*, Mrs. Stover retains a continuing interest in the class should the Eighth Circuit be reversed by this Court and the class action proceed to a successful conclusion. *Roper*, 445 U.S. at 336. In addition, Mrs. Stover, like the class representative whose individual claim was mooted in *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), retains a "personal stake" in the outcome of the litigation. Whether or not she settles her *individual* claim for damages, she may proceed on her other claims that the certification of a mandatory class was proper and did not violate the Anti-Injunction Act. *Geraghty*, 445 U.S. at 402-07.[6]

A second charge respondents make is that petitioner "abandoned" the class certified on January 25, 1982 when she sought certification of another class. This is without foundation. Petitioner sought certification of another mandatory class modified to exclude those state court plaintiffs who had filed before the District Court entered a new certification order. Later, petitioner moved in the

---

[6] Should there be a doubt, however, there are at least two other federal court plaintiffs who are willing and able to intervene in these proceedings. *See, United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 393-95 (1977); *see also, Rogers* v. *Paul*, 382 U.S. 198, 199 (1965); *Mullaney* v. *Anderson*, 342 U.S. 415, 416-17 (1952).

alternative for a Rule 23(b)(3) "opt out" class. Both proposals were expressly stated to be *conditioned upon the results of a decision from this Court.* In her briefs, petitioner stressed that if the Eighth Circuit were reversed, the District Court should reinstate the original class in accordance with this Court's directives.[7]

Contrary to respondents' assertions, this case is far from over. The remaining cases in state court have a trial date set for March, 1983—and the state plaintiffs have indicated their continuing desire to prosecute their punitive damage claims. Unless the hundreds of class members[8] are protected by the creation of a mandatory class, any distribution of punitive damage awards will not be made according to principles of equity, but in a race to judgment by a handful. Only this Court can prevent that injustice and keep intact both Rule 23 and the final judgment rule.

---

[7] *See,* Memorandum In Support of Plaintiffs' Motion to Modify Plaintiffs' Class filed July 1, 1982; Plaintiffs' Reply To Defendants' and Plaintiff-Intervenors' Suggestions In Opposition To Certification Of A Class Action, filed September 9, 1982.

[8] Respondents erroneously claim that only two class members support the class. Since no notice has been sent to the over 700 identified class members, it is impossible to say how many support the class action. However, the District Court recently indicated at a hearing that several class members had written to him asking that he protect their interests. Class counsel have also received such letters. Lastly, two class members have requested the certification of a new class with themselves as class representatives.

CONCLUSION

Petitioners Shirley Stover and the class respectfully request that their petition for certiorari be granted.

IRVING YOUNGER *
PAUL MARTIN WOLFF *
NANCY F. PREISS
WILLIAMS & CONNOLLY
The Hill Building
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Attorneys for Petitioners, the Representative Plaintiff and the Class

ROBERT C. GORDON
4722 Broadway
Kansas City, Missouri 64112

ARTHUR H. STOUP
STOUP & THOMPSON
950 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106

ROBERT L. COLLINS
2800 Louisiana Street
Houston, Texas 77006

WILLIAM P. WHITAKER
4722 Broadway
Kansas City, Missouri 64112

RICHARD L. COLBERT
NORTH COLBERT AND FIELDS
211 Professional Building
1103 Grand Avenue
Kansas City, Missouri 64106

with respect to all matters pertaining to class certification,

ARTHUR R. MILLER
Harvard Law School
Cambridge, Massachusetts
02138

* Counsel of Record